WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–23–62 OF 2005
BADARIAH SAHAMID J
23 MAY 2011

Tort — Damages — Aggravated damages — Policy behind award of aggravated damages — Claim for aggravated damages in libel action — Compensation for mental distress — Whether a limited company could be awarded aggravated damages — Whether defendant demonstrated careless or reckless disregard of plaintiff's rights

Tort — Damages — Exemplary damages — Policy behind award of exemplary damages — Claim for exemplary damages in libel action — Whether defendant's conduct was calculated to profit itself

Tort — Defamation — Libel — Damages — Whether separate awards to be made for exemplary and aggravated damages — Damages not to be excessive

Tort — Defamation — Libel — Publication of defamatory articles in open testimonial letter — Letter containing comparisons made between products and services of two competitor companies — Elements to be established in defamation action — Whether letter published to third parties — Whether defamatory statements in letter referred to plaintiff — Whether giving rise to innuendo that plaintiff lacked technical know-how, professionalism, integrity and trust — Whether damaging to plaintiff's reputation

The plaintiff was the sole authorised local distributor/agent in Malaysia of a product called 'SteamGard' system since 24 April 2003. Prior to that, until 12 November 2004, Worldwide Rota Dies Sdn Bhd ('WRD') was an authorised distributor/agent to sell and install the 'Steamgard' system at customers' premises. The SteamGard system was an energy and steam/fuel savings system used mainly in the manufacturing industry. The defendant had previously purchased installed and used the 'SteamGard' system at its premises. However, the defendant later became dissatisfied with the SteamGard system and switched to another energy/steam savings system known as 'Steam Pro' system which was supplied by Steam Pro Conservation Sdn Bhd ('SCSB'). SCSB had requested Mr. Yim, the defendant's general manager, to issue a testimonial

letter. Mr Yim obliged and based on a draft by SSCB, issued a testimonial letter ("the letter") on the defendant's letterhead. The letter was circulated to third parties, comprising customers and others. The contents of the testimonial letter were alleged by the plaintiff to be defamatory of the plaintiff and disparaging of the plaintiff's product, 'SteamGard'. Hence the plaintiff commenced this action, claiming damages, aggravated and exemplary damages for libel.

Held, allowing the application:

(1) To succeed in an action for defamation, the plaintiff would have to establish the following elements: (i) That the statement made by the plaintiff is defamatory according to the following objective test: whether the statement made tends to lower the plaintiff in the estimation of right thinking members of society generally. A statement may be expressly defamatory or defamatory by innuendo ie using the following objective test: what ordinary and reasonable persons would infer as the natural and ordinary meaning of words, and whether such inference is defamatory; (ii) That the alleged defamatory statement refers to the plaintiff; and (iii) That the statement has been published to a third party (see para 11).

(2) The statement was contained in the letter written and signed by the defendant addressed in general terms 'to whom it may concern'. The letter was published to a third party/s. Thus the element of publication of defamation was satisfied (see para 13).

(3) Reading the letter as a whole, a reasonable person would by reference to the express mention of the plaintiff and no other person anywhere in the letter reasonably infer that the comparison throughout was not just between the rival products Steamguard and SteamPro but also a comparison between the respective services of the competitors. It was not necessary that the plaintiff be referred to in each and every paragraph which contained alleged defamatory statement in order for persons reading the letter to make the reasonable inference that throughout the letter, the adverse comparison was attributed to the plaintiff. The defamatory statements in the letter referred to the plaintiff and no other person (see paras 18 & 20).

(4) On its own, the attributes of SteamPro extolled by the defendant were harmless — except that here they appeared after the author had expressly in his opening lines informed the recipient that he was embarking on a comparison between the two products, and when praising the services of SteamPro while being silent on the services of the plaintiff. A reasonable inference was that the comparison between the two competitors was sustained, and by innuendo, that the plaintiff was unprofessional, untrustworthy and lacking in good technical know-how and integrity. To be accused (even by innuendo) of lacking technical know-how,

professionalism, integrity and trust was seriously damaging to the plaintiff's reputation (see paras 28–29).

(5) The judicial trend is not to grant separate awards for exemplary and aggravated damages, and a global award should be the practice. This is to ensure that awards are not excessive, and to avoid 'double counting' as the circumstances giving rise to exemplary/aggravated and general damages are usually inextricably intertwined. A court in assessing appropriate and proper damages needs to be mindful of apportioning a sum that is a vindication and compensation of the plaintiff proportionate to the harm suffered without, giving the impression to plaintiffs that a libelous suit can be the road to untaxed riches (see paras 35–37).

(6) Exemplary damages are punitive in nature. The underlying policy behind a court's award for punishment, deterrence and denunciation is to send a strong message to the defendant and potential tortfeasors, that 'tort does not pay'. The defendant's conduct here was not calculated to profit itself. On the contrary, the defendant had obliged another —WRD for a 'testimonial letter' — and if anyone were to profit it would be WRD who was stated as the plaintiff's competitor. Hence, there was no basis for the award of exemplary damages (see paras 39–42).

(7) The policy behind aggravated damages is compensatory in nature in that additional damages are awarded to compensate the plaintiff for the mental distress caused by the defendant's libel. A limited company could be awarded aggravated damages although such award would be lower than that which a human being who has feelings could receive. The defendant was liable for aggravated damages because the defendant had refused to apologise to the plaintiff for the defamatory statements. While there was no malice on the defendant, however the fact that the letter was intentionally drafted and approved by the defendant demonstrated a careless even reckless disregard of the plaintiff's rights (see paras 43–45, 48 & 50).

[Bahasa Malaysia summary

Plaintif merupakan satu-satunya pengedar/ajen tempatan yang diberi kuasa di Malaysia untuk produk dipanggil sistem 'SteamGard' sejak 24 April 2003. Sebelum itu, sehingga 12 November 2004, Worldwide Rota Dies Sdn Bhd ('WRD') adalah pengedar/ejen yang diberi kuasa untuk menjual dan memasang sistem 'Steamgard' di premis pelanggan-pelanggan. Sistem SteamGard adalah sistem jimat tenaga dan wap/bahan bakar yang digunakan terutamanya dalam perusahaan perkilangan. Defendan sebelum ini telah memasang dan menggunakan sistem 'SteamGard' di premisnya. Walau bagaimanapun, defendan kemudian tidak berasa puas hati dengan sistem SteamGard itu dan bertukar kepada sistem jimat tenaga/wap yang dikenali sebagai sistem 'Steam Pro' yang dibekal oleh SteamPro Conservation Sdn Bhd

('SCSB'). SCSB telah meminta Mr Yim, pengurus besar defendan, mengeluarkan surat testimoni. Encik Yim bersetuju dan berdasarkan draf oleh SCSB, telah mengeluarkan surat testimoni itu ('surat tersebut') atas kepala surat defendan. Surat itu telah diedarkan kepada pihak ketiga yang terditi daripada pelanggan dan lain-lain. Kandungan surat testimoni tersebut dikatakan plaintif sebagai berunsur fitnah terhadapnya dan mencaci produk plaintif, 'SteamGard'. Justeru itu plaintif telah memulakan tindakan ini, menuntut ganti rugi dan ganti rugi tambahan dan teladan untuk libel.

Diputuskan, membenarkan permohonan:

(1) Untuk berjaya dalam tindakan fitnah, plaintif perlu membuktikan elemen-elemen berikut: (i) bahawa kenyataan yang dibuat oleh plaintif berunsur fitnah menurut ujian objektif berikut: sama ada kenyataan itu bermaksud merendahkan martabat plaintif pada anggapan masyarakat yang berfikiran waras secara umunya. Kenyataan mungkin boleh dengan jelas berunsur fitnah atau berunsur fitnah secara sindiran, iaitu dengan menggunakan ujian objektif berikut: apakah yang orang biasa dan munasabah membuat inferens sebagai maksud perkataan yang semulajadi dan biasa, dan sama ada inferens sedemikian berunsur fitnah; (ii) bahawa kenyataan berunsur fitnah yang dikatakan itu merujuk kepada plaintif, dan (iii) bahawa kenyataan tersebut telah diterbitkan kepada pihak ketiga (lihat perenggan 11).

(2) Kenyataan tersebut terkandung dalam surat yang ditulis dan ditandatangani oleh defendan yang dialamatkan dalam terma umum ''to whom it may concern'. Surat itu telah diterbitkan kepada pihak ketiga. Oleh itu elemen penerbitan fitnah telah dipenuhi (lihat perenggan 13).

(3) Dengan membaca surat tersebut secara keseluruhan, seseorang yang munasabah dengan merujuk kepada kenyataan tentang plaintif dan tiada orang lain di mana-mana dalam surat tersebut secara munasabah boleh membuat inferens bahawa perbezaan bukan sahaja antara produk yang bersaing Steamgard dan SteamPro tetapi juga perbezaan antara perkhidmatan pesaing masing-masingnya. Adalah tidak perlu untuk plaintif dirujuk dalam setiap dan semua perenggan yang mengandungi kenyataan berunsur fitnah yang dikatakan bertujuan untuk sesiapa yang membaca surat tersebut membuat inferens munasabah bahawa sepanjang surat tersebut, perbandingan bertentangan adalah disebabkan oleh plaintif. Kenyataan berunsur fitnah dalam surat tersebut merujuk kepada plaintif dan tiada siapa lagi (lihat perenggan 18 & 20).

(4) Dengan sendirinya, ciri-ciri SteamPro yang dipuji oleh defendan tidak membahayakan — kecuali di sini ia timbul setelah penulis dengan nyata daam kata-kata pembukanya telah memberitahu penerima bahawa dia sedang membuat perbandingan antara dua produk dan apabila memuji perkhidmatan SteamPro tetapi tidak menyebut apa-apa tentang

perkhidmatan plaintif. Inferens munsabah adalah bahawa perbandingan antara dua pesaing itu dikekalkan, dan melalui sindiran, bahawa plaintif tidak profesional, tidak boleh dipercayai dan tidak cukup pengetahuan teknikal dan integriti yang baik. Untuk dituduh (walaupun secara sindiran) tidak cukup pengetahuan teknikal, profesionalisme, integriti dan kepercayaan telah dengan serius menjejaskan reputasi plaintif (lihat perenggan 28–29).

(5) Arah aliran kehakiman adalah untuk tidak memberikan award berasingan untuk ganti rugi teladan dan tambahan, dan award menyeluruh wajar diamalkan. Ini adalah untuk memastikan award-award tersebut tidak melampau, dan untuk mengelakkan 'double counting' kerana keadaan menimbulkan ganti rugi teladan/tambahan dan ganti rugi am biasanya berkait rapat. Mahkamah dalam menaksirkan ganti rugi yang sesuai dan wajar perlu mempertimbangkan untuk membahagikan sejumlah yang merupakan penyangkal dan pampasan plaintif setimpal dengan bahaya yang dialaminya tanpa memberikan gambaran kepada plaintif-plaintif bahawa guaman libel adalah jalan ke arah kekayaan tanpa cukai (lihat perenggan 35–37).

(6) Ganti rugi teladan bersifat punitif. Polisi yang menjadi asas award mahkamah untuk hukuman, pencegahan dan pembatalan adalah untuk menyampaikan mesej penting kepada defendan dan yang berpotensi menjadi pesalah laku tort, bahawa 'tort does not pay'. Perlakuan defendan di sini tidak dikira menguntungkan. Sebaliknya, defendan telah memenuhi permintaan untuk satu lagi — WRD untuk 'testimonial letter' — dan jika sesiapa yang mendapat untung adalah WRD yang dinyatakan sebagai pesaing plaintif. Justeru itu tiada asas untuk award ganti rugi teladan (lihat perenggan 39–42).

(7) Polisi untuk ganti rugi tambahan adalah bersifat pampasan di mana ganti rugi tambahan diawardkan untuk memberi pampasan kepada plaintif untuk kesengsaraan mental yang disebabkan oleh libel defendan. Syarikat terhad boleh diawardkan ganti rugi meskipun award tersebut lebih rendah daripada apa yang diterima oleh seorang yang mempunyai perasaan. Defendan bertanggungjawab untuk ganti rugi tambahan kerana defendan enggan meminta maaf kepada plaintif kerana kenyataan berunsur fitnah tersebut. Walaupun tiada niat jahat di pihak defendan, namun hakikat bahawa surat tersebut dengan sengaja didraf dan diluluskan oleh defendan menunjukkan sikap cuai dan melulu tanpa mengira hak-hak plaintif (lihat perenggan 43–45, 48 & 50).]

Notes

For cases on aggravated damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 150–153.

For cases on exemplary damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–201.
For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

Cases referred to

Boustead Trading(1985) Sdn Bhd v Arab Malaysian Bank Bhd [1995] 3 MLJ 331; [1995] 3 AMR 2871, FC (refd)
Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)
Charleston v News Group Newspapers Ltd [1995] 2 AC 65, HL (refd)
Chin Choon @Chin Te Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 3 AMR 189, CA (refd)
Keluarga Communications v Normala Samsuddin [2006] 2 MLJ 700, CA (refd)
Khaw Cheng Poon v Khan Cheng Bok [2005] 6 MLJ 540; [2005] 3 CLJ 753, CA (refd)
Lewis v Dally Telegraph Ltd (1964) AC 234, HC (refd)
Messenger Newspaper Group Ltd v National Geographical Association [1984] IRLR 307 (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Sim v Stretch [1936] 2 All ER 1237, HL (refd)
Walter v All Tools Ltd (1944) 171 LT 371 (refd)

David Hoh (HQ Kwong and Kingston Tan with him) (Heiley Hasan Tan & Partners) for the plaintiff's.
Gregory Ling (Ranjit Singh & Yeoh) for the defendant.

Badariah Sahamid J:

[1] The plaintiff had brought an action in defamation against the defendant. At the outset it was agreed, that the trial would determine the question of liability as well as if applicable, liability for exemplary or aggravated damages. In the event the defendant was found liable, an assessment of damages would be held subsequently.

[2] After full trial I decided that the statements contained in the abovementioned letter were defamatory and found the defendant liable. I also allowed aggravated damages to the plaintiff. The defendant has appealed against my decision. The grounds of my decision are as follows.

BACKGROUND FACTS

[3] The plaintiff, a company incorporated in Malaysia is the sole authorised local distributor/agent in Malaysia of a product called 'SteamGard' system since 24 April 2003. Prior to that, until 12 November 2004 one, Worldwide Rota Dies Sdn Bhd ('WRD') was an authorised distributor/agent to sell and

install the 'SteamGard' system at customers' premises. The SteamGard system is essentially an energy and steam/fuel savings system used mainly in the manufacturing industry. It was manufactured in the United States of America by Engineering Resources Inc.

[4] The defendant is a company incorporated in Malaysia and is in the business of manufacturing and marketing latex gloves. The defendant had previously purchased installed and used the 'SteamGard' system at its premises sometime in June 2004. It is not disputed that the plaintiff had purchased the SteamGard system from WRD. However, the defendant later became dissatisfied with the SteamGard system and complained to WRD. WRD then recommended the defendant to switch to another energy/steam savings system known as 'Steam Pro' system which was supplied by a company called Steam Pro Conservation Sdn Bhd (SCSB).The defendant subsequently dismantled the SteamGard system and installed the Steam Pro system in its place.

[5] SCSB then requested Mr Yim Hoon Pung who was then general manager of the defendant to issue a testimonial letter ('P37'). Mr Yim obliged and based on a draft by SSCB issued a testimonial letter dated 6 June 2006 on the defendant's letterhead. The letter is reproduced in full as follows.

Date: 6 June 2006

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

STEAMPRO (SP)STEAM- SAVING SYSTEM

We refer to the above and wish to inform you that we, KL-Kepong Rubber Products Sdn Bhd was a user of SteamGard before but is currently a user of SteamPro.

As the General Manager of KL- Kepong, I agreed with the proposal of my Factory Manager to install Steam Gard with the objective to save certain percentage of steam. However, after a few months of using SteamGard, the result was not satisfactory as SteamGard did not perform to our expectation against our investment.

Due to the above we have decided to try out SteamPro Conservation Sdn.Bhd's steam saving system, Steam Pro. After the conversion to SteamPro, we have been enjoying good savings (more than 30 %) and minimum maintenance. This is a result of the superior materials used in manufacturing its components, the effectiveness in the design.

We would like to acknowledge that Steam Pro is an effective steam saving system and Steam Pro Conservation's service team has shown professionalism before, during and after the installation demonstrating good technical know-how. We are aware that Steam Pro's competitor, WLP Industrial Solutions Sdn. Bhd. Is circulating damaging information regarding Steam Pro system but we find the circulated information contrary to our experienced with SteamPro.

The high expectations on integrity, trustworthiness and total customers' satisfaction practiced throughout their organization have in turn given us assurance of high standards and great satisfaction in dealing with SteamPro Conservation. We would continue to work with SteamPro Conservation and listen to their recommendations.

Thank you.

[6] The letter was written on the defendant's letterhead and signed by Mr Yim Hoon Pung who was then general manager and a director of the defendant. The above letter was circulated to third parties, comprising customers and others. The contents of the aforesaid testimonial letter are alleged by the plaintiff to be defamatory of the plaintiff and disparaging of the plaintiff's product, 'SteamGard'.

THE PLAINTIFF'S CLAIM

[7] The plaintiff's allegation may be summarised as follows:

[8] The defendant had maliciously and/or falsely and/or recklessly published a 'To whom it may concern' circular letter dated 6 June 2005 (P37) to the general public and world at large expressly containing false and untrue words and/by innuendo, defamatory of the plaintiff and of the SteamGard products sold by the plaintiff, causing damage to business reputation and loss of business.

[9] The defendant had refused to apologise for the defamatory publication despite the plaintiff's demands through the plaintiff's solicitors letters dated 24 June 2005, 5 July 2005 and 12 July 2005. (P57, 58 and 59)

[10] Thus the plaintiff claims the following against the defendant:

(a) damages for libel;

(b) aggravated and/or exemplary damages for libel;

(c) an injunction to restrain the defendant by itself, its agents and/or servants or otherwise from further publishing, distributing and/or disseminating and/or causing to be published, distributed and/or disseminated the said words set out in the letter (P37);

(d) interests of 8% commencing on 6 June 2005; and

(e) costs.

FINDINGS AND DECISION

[11] It is well established that to succeed in an action for defamation, the plaintiff would have to establish the following elements:

(a) The statement made by the plaintiff is defamatory according to an

objective test that has been expressed thus: whether the statement made tends to lower the plaintiff in the estimation of right thinking members of society generally *Sim v Stretch* [1936] 2 All ER 1237 at p 1240. In other words, whether the statement had adversely affected (harmed) the plaintiff's reputation in the eyes of reasonable men. The test is objective not subjective. Thus, whether or not the defendant intended to defame the plaintiff is irrelevant. It is also irrelevant whether the third parties to whom the statement was published believed the statement to be true.

(b) The alleged defamatory statement refers to the plaintiff. Where the plaintiff is not referred to by name, would the reasonable person, having knowledge of the circumstances, understand the words to refer to the plaintiff. It is also irrelevant whether the defendant had intended to refer to the plaintiff.

( )A statement may be expressly defamatory or defamatory by innuendo ie using the objective test again — what ordinary and reasonable persons would infer as the natural and ordinary meaning of words, and whether such inference is defamatory (*Lewis v Daily Telegraph Ltd.* [1964] AC 234 at p 271). In this respect, this court needs to consider the alleged defamatory statements in the context of the article as a whole. It is not enough to point to a particular sentence or isolated paragraph. This was the approach taken by the House of Lords in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 as well as *Keluarga Communications v Normala Samsuddin* [2006] 2 MLJ 700.

(c) The statement has been published to a third party.

[12] I will now state my findings on the alleged defamatory statements.

Was the alleged defamatory statement published to a third party?

[13] The statement alleged to be defamatory is contained in a letter (P37) written and signed by the defendant addressed in general terms 'to whom it may concern'. It is not disputed that the letter was published to a third party/s. Thus this element of publication of defamation is satisfied.

Does P37 refer to the plaintiff?

[14] The alleged defamatory statement must either expressly or by reasonable inference refer to the plaintiff.

[15] From my reading of P37 as a whole and considering the alleged defamatory statements expressed or inferred in context, I surmise the following.

[16] The author of P37 (the defendant) who has had the experience of using two competitive steam saving products — Steamgard and SteamPro, is comparing the two products in terms of its product and design quality and its effectiveness as a steam saving device. This is made clear by the defendant in the opening lines of P37:

> We refer to the above and wish to inform you that we, KL- Kepong Products Sdn. Bhd. was a user of SteamGuard before but is currently a user of SteamPro.

[17] The author then referred to the defendant by name as well as 'SteamPro's competitor' and that the defendant 'is circulating damaging information regarding SteamPro system', which information is untrue. The defendant then proceeds to heap praises on the technical knowledge, services as well as character of plaintiff's competitor SteamPro while remaining silent about the plaintiff.

[18] Reading P37 as a whole, a reasonable person would by reference to the express mention of the plaintiff and no other person anywhere in P37 reasonably infer that the comparison throughout is not just between the rival products Steamguard and SteamPro but also a comparison between the respective services of competitors SteamPro Conservation Bhd to WLP Industrial Solutions Sdn Bhd. To my mind, it is not necessary that the plaintiff be referred to in each and every paragraph which contains an alleged defamatory statement in order for persons reading P37 to make the reasonable inference that throughout the letter, the adverse comparison was attributed to the plaintiff.

[19] This inference is fortified by the uniform and consistent content of P37 which from its opening lines to its concluding paragraph makes a comparison between rival products as well as services offered by the two mentioned rival companies, concluding in favour of the plaintiff's competitor.

[20] Thus it is my considered opinion that the plaintiff has succeeded in establishing that the statements alleged to be defamatory in P37 referred to the plaintiff and no other person.

Is P37 defamatory?

Slander of goods

[21] Among the statements alleged to be defamatory by the plaintiff are statements relating to the product SteamGard and may be summarised as

follows: The allegation that the statements inferred directly or by innuendo that SteamGuard was inferior to SteamPro in terms of material, design, steam saving and maintenance.

[22] While as the defendant has contended, slander of goods has not been specifically pleaded by the plaintiff as a separate cause of action, the material facts giving rise to the plea has been sufficiently raised by the plaintiff to enable this court to make a finding on the matter (*Boustead Trading(1985) Sdn Bhd v Arab Malaysian Bank Bhd* [1995] 3 MLJ 331; [1995] 3 AMR 2871 at p 2886).

[23] However, I am unable to make a conclusive finding on this matter due to the insufficiency of the evidence adduced before me. While the description of SteamGard is capable of a defamatory meaning, I am unable to ascertain to what extent the defendant's allegations of the ineffectiveness of the product is countered by the defence of justification.PW2 himself had testified that the SteamGuard was customised to the particular needs of the customer, thus the performance of SteamGard would have to be considered in relation to other factors or variables unique to the customer.

[24] In answer 133 of PW2's witness statement: 'Thus every proposal that we had prepared for our customer are unique with specific for their own requirements and specific guarantees.'

[25] The fact that the defendant had replaced Steamguard with SteamPro seems to suggest, to me, not necessarily that Steam Pro was a superior product per se to SteamGuard but that SteamPro was a more suitable product for the defendant's particular requirements.

Defamatory statements

[26] I consider the following statements to be capable of a defamatory meaning.

(a) The fouth paragraph of P37 which states that, 'Steam Pro's competitor, WLP Industrial Solutions Sdn Bhd is circulating damaging information regarding Steam Pro system but we find the circulated information contrary to our experience with SteamPro'.

[27] I find this statement to be defamatory as the inference is that the defendant resorts to unethical practices of disparaging its business competitor. However, the defendant has raised the defence of justification to the alleged defamatory statement and I find merits to this defence as exhibits show that the plaintiff had circulated information that suggests Steam Pro was a product that had breached intellectual property rights and as being an imitation. Such

information whether or not it is true, would in the ordinary sense be damaging to SteamPro Sdn Bhd.

(b) The author of P37 (defendant) had proceeded to extol the virtues of SteamPro in terms of their professionalism, technical know how, integrity, trustworthiness and ability to fulfill customer expectations and satisfaction. The defendant was silent on the plaintiff. The author then concluded by expressing unreserved support for SteamPro Sdn Bhd. The question to be asked is what would a reasonable person infer from the above?

[28] On its own, the above attributes of SteamPro extolled by the defendant would be harmless — except that here they appear after the author had expressly in his opening lines informed the recipient that he was embarking on a comparison between the two products, and when praising the services of SteamPro while being silent on the services of the plaintiff, a reasonable inference is that the comparison between the two competitors is sustained, and by innuendo, that the plaintiff was lacking in the abovementioned attributes, ie that the plaintiff was unprofessional, untrustworthy and lacking in good technical know-how and integrity. This is fortified by the defendant stating that the plaintiff 'is circulating damaging information regarding Steam Pro system' (*Lewis v Dally Telegraph Ltd* (1964) AC 234).

[29] I have no doubt that to be accused (even by innuendo) of lacking technical know-how, professionalism, integrity and trust are seriously damaging to the plaintiff's reputation.

[30] It may well be as the defence contends that the defendant was only writing a testimonial in favour of the plaintiff's competitor SteamPro Sdn Bhd. If it was only the product and services of SteamPro Sdn Bhd that was the subject matter of the glowing testimonial (as testimonials usually are) that would not raise any problems. However, in P37 the defendant went further by drawing adverse comparison to the product and (by inference) services of the plaintiff and in doing so had the effect of defaming the plaintiff. The defendant may not have intended this, but as mentioned, whether or not the defendant had intended to defame the plaintiff is irrelevant.

[31] The only matter left to be considered is whether the defendant can plead any defences.

[32] I find the innuendo that the plaintiff was unprofessional, untrustworthy, lacking good technical know-how, professionalism, integrity

and trust defamatory, and the defendant has failed to adduce evidence that the above description of the plaintiff was justified or are fair comments or are privileged.

[33] Thus I find the defendant liable for the tort of libel and award costs to the plaintiff. I also allow the plaintiff's application for an injunction as pleaded.

Exemplary and or aggravated damages

[34] This decision on the above heads of damages is consequential on my finding of defendant's liability for libel after full trial. At case management, it was understood that the decision today on exemplary and or aggravated damages is on liability and not quantum.

[35] The judicial trend is not to grant separate awards for exemplary and/or aggravated damages, and a global award should be the practice.

Chin Choon @Chin Te Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 3 AMR 189

[36] This is to ensure that awards are not excessive, and to avoid 'double counting' as the circumstances giving rise to exemplary/aggravated and general damages are usually inextricably intertwined.

[37] There is no precise mathematical formula for the assessment of damages in defamation. A court in assessing appropriate and proper damages needs to be mindful of apportioning a sum that is a vindication and compensation of the plaintiff proportionate to the harm suffered without, as one judge puts it, giving the impression to the plaintiff that a libelous suit can be the road to untaxed riches.

[38] Exemplary and aggravated damages have frequently been used interchangeably by the courts, however recent decisions have sought to clarify the different policies and principles underlying both categories of damages.

Exemplary damages

[39] Exemplary damages are punitive in nature. The underlying policy behind a court's award for punishment, deterrence and denunciation is to send a strong message to the defendant and potential tortfeasors, that 'tort does not pay'. The Law Reform Commission, UK (1997) stated it was an exceptional remedy rarely awarded and reserved for the most reprehensible of civil wrongs. This position has been echoed by the Court of Appeal in the case of *Khaw Cheng Poon v Khan Cheng Bok* [2005] 6 MLJ 540; [2005] 3 CLJ 753 the Court

of Appeal where Gopal Sri Ram, inter alia, said that exemplary damages are only awarded in very special circumstances. The circumstances are contained in Lord Devlin's judgement in *Rookes v Barnard* [1964] AC 1129 — that no new categories are admissible and this has been settled by the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027.

[40] Out of these three categories, only the second is relevant here ie where the defendant's conduct was calculated to make a profit for himself which could exceed the compensation payable to the plaintiff.

[41] From the evidence adduced at trial, the defendant's conduct was not calculated to profit himself. On the contrary, the defendant had obliged another — WRD for a 'testimonial letter' — and if anyone were to profit it would be WRD who was stated as the plaintiff's competitor.

[42] I therefore find no basis for the award of exemplary damages and disallow the plaintiff's claim for such.

Aggravated Damages

[43] In contrast to exemplary damages, the policy behind aggravated damages is compensatory in nature — in that additional damages are awarded to compensate the plaintiff for the mental distress caused by the defendant's libel. In the case of *Walter v All Tools Ltd* (1944) 171 LT 371 it was stated that the basis of the award is evidence of aggravating circumstances associated with the defendant's conduct. However this court is also mindful that in granting such, there is no 'double counting'.

[44] The question has been raised that because aggravated damages focuses on the mental distress/injured feeling of the defendant — can a corporate plaintiff who is necessarily inanimate be entitled to aggravated damages as corporations are not capable of feeling mental distress or injured feelings.

[45] In the case of *Messenger Newspaper Group Ltd v National Geographic Association* [1984] IRLR 307 the court held that a limited company could be awarded aggravated damages although such award would be lower than that which a human being who has feelings could receive.

[46] On careful consideration, I find the defendant liable for aggravated damages for the following reasons:

[47] The defendant had refused to apologise to the plaintiff for the defamatory statements despite three letters of the plaintiff's solicitors dated 24 June 2005, 5 July 2005 and 12 July 2005 (exhs P57, P58 and P59)

[48] To the defendant's credit however, the defendant did on 12 July 2005 write to WRD to request that stop circulation of P37 and to retrieve and destroy copies (exh D23).

[49] Cases have held that where a libel is widely published eg in a newspaper, it would furnish grounds for aggravated damages as a wider circulation would aggravate a plaintiff's distress. In this case while the libel was not published in a newspaper for general circulation, it is my considered opinion that in the particular circumstances, the mode of publication caused more than ordinary distress to the plaintiff. P37 was circulated purportedly as a testimonial letter, on the defendant's official letterhead and signed by its managing director. It was circulated to members of a business community who were involved in business directly concerned with the business of the defendant and persons who not only may have had business dealings with the plaintiff but also include potential customers of the plaintiff. Apart from the dollars and sense fallout (and I caution myself against 'double counting' here) such publication would certainly affect the plaintiff's credibility and integrity in the eyes of the business community in which the plaintiff earned its livelihood, which would reasonably cause the plaintiff much mental distress.

[50] While I find insufficient grounds to attribute malice to the defendant — however the fact that P37 was intentionally drafted and the draft approved by the defendant demonstrate to my mind a careless even reckless disregard of the plaintiff's rights. For the above reasons I award the plaintiff aggravated damages, the quantum to be determined at a later date.

Application allowed.

Reported by Kanesh Sundrum